

05-1412
Sales Tax Withholding Tax
Signed 03/20/2007

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
Petitioner,)	AND FINAL DECISION
)	
v.)	Appeal No. 05-1412
)	Account No. #####-1
TAXPAYER SERVICES DIVISION OF)	#####-2
THE UTAH STATE TAX)	Tax Type: Sales Tax
COMMISSION,)	Withholding Tax
)	
Respondent.)	Judge: Jensen

Presiding:

D'Arcy Dixon Pignanelli, Commissioner
Clinton Jensen, Administrative Law Judge

Appearances:

For Petitioner: PETITIONER
For Respondent: RESPONDENT REPRESENTATIVE 1, Assistant Attorney General
RESPONDENT REPRESENTATIVE 2, from the Taxpayer Services
Division
RESPONDENT REPRESENTATIVE 3, from the Taxpayer Services
Division

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on November 30, 2006. Based upon the evidence and testimony presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. The assessment in question is a personal penalty assessment, made against Petitioner for the unpaid tax of \$\$\$\$\$.

2. The periods in question are July 2003, August 2003, September 2003 October 2003 and November 2003 for sales tax, and July 2003 and August 2003 for withholding tax.

3. The Division sent its Statutory Notice to the Petitioner regarding the assessment of a personal penalty assessment on August 30, 2005.

4. The Petitioner was the president of COMPANY A (COMPANY A) from 2000 to 2003.

5. The Petitioner was in control of the business during 2003 and had full authority to make sure taxes were paid.

6. As of 2003, the assets of COMPANY A, including the accounts receivable, were subject to a security interest held by COMPANY B.

7. During the time of COMPANY A's liquidation from July 2003 to November 2003, COMPANY B exercised its security interest by taking funds from COMPANY A's account with COMPANY B as quickly as the Petitioner made deposits to that account.

8. While the liquidation was underway and COMPANY B was taking funds for its own purposes, the Petitioner made bank personnel aware of the need to pay sales and withholding taxes on sales and wages. The Petitioner testified that bank personnel, many of whom the Petitioner considered trusted friends, provided assurances that the bank would pay necessary sales and withholding taxes.

9. The Petitioner did not investigate whether COMPANY B was keeping promises that its personnel had made to pay sales and withholding taxes.

10. COMPANY B did not pay any sales or withholding taxes on the proceeds of the liquidation sale with the funds it removed from COMPANY A's accounts.

APPLICABLE LAW

Utah Law provides for a personal penalty assessment for a company's unpaid withholding tax liabilities. It is listed in Utah Code Ann. §59-1-302(1994) and provides in pertinent part:

(1) The provision of this section apply to the following taxes in this title: . . .(g) withholding tax . . .

(2) Any person required to collect, truthfully account for, and pay over any tax listed in Subsection (1) who willfully fails to collect the tax, fails to truthfully account for and pay over the tax, or attempts in any manner to evade or defeat any tax or the payment of the tax, shall be liable for a penalty equal to the total amount of the tax evaded, not collected, not accounted for or not paid over. This penalty is in addition to other penalties provided by law . . .

(7)(a) in any hearing before the Commission and in any judicial review of the hearing, the commission and the court shall consider any inference and evidence that a person has willfully failed to collect, truthfully account for, or pay over any tax listed in Subsection (1).

(b) It is prima facie evidence that a person has willfully failed to collect, truthfully account for, or pay over any of the taxes listed in Subsection (1) if the commission or a court finds that the person charged with the responsibility of collecting, accounting for or paying over the taxes:

(i) made a voluntary, conscious, and intentional decision to prefer other creditors over the state government or utilize the tax money for personal purposes;

(ii) recklessly disregarded obvious or know risks, which resulted in the failure to collect, account for, or pay over the tax; or

(iii) failed to investigate or to correct mismanagement, having notice that the tax was not or is not being collected, accounted for, or paid over as provided by law.

The Utah Supreme Court has held that the requirement in Utah Code Ann. §59-1-302(7)(b)(i) that a taxpayer “made a voluntary, conscious, and intentional decision to prefer other creditors over the state government or utilize the tax money for personal purposes” requires that a taxpayer have funds available that are not subject to a previous security agreement or lien. *Tax Comm’n v. Stevenson*, 2006 UT 84, ¶34. A valid security interest, arising before a tax lien, is superior to the tax lien because the tax lien does not arise until the state gives notice of its lien. 2006 UT 84 at ¶40. Thus, in accordance with the Utah Supreme Court’s ruling in *Stevenson*, a taxpayer cannot violate Utah Code Ann. §59-1-302(7)(b)(i) by preferring another creditor over the state if the other creditor holds a previous security interest in the funds being used to satisfy the creditor. *See* 2006 UT 84 at ¶41. Under Utah Code Ann. §59-1-302(7)(b)(ii), there is no strict liability for disregarding risks that could result in the nonpayment of taxes. Even negligence will not trigger liability. 2006 UT 84 at ¶25. Rather, there must be reckless conduct in the face of an obvious or known risk of nonpayment. *Id.* Failing to investigate or correct mismanagement will not provide prima facie evidence to support a personal penalty unless there is actual “notice that the tax was not or is not being collected, accounted for, or paid over as provided by law.” Utah Code Ann. §59-1-302(7)(b)(iii).

CONCLUSIONS OF LAW

Petitioner was a person responsible for paying over sales and withholding tax. But he did not make a “voluntary, conscious, and intentional decision to prefer other creditors over the state.” At the time the Petitioner made payments to COMPANY B, he did so under a security

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agreement that existed before the state's tax lien arose. The Petitioner was negligent in disregarding the risk that COMPANY B would keep funds for itself rather than paying taxes as promised, but this negligence is not sufficient to trigger a personal penalty. Because the Petitioner did not have notice that COMPANY B was failing to pay taxes at a time when funds were available to pay taxes, there were not events sufficient to trigger a requirement that the Petitioner make investigation or correct mismanagement regarding the actions of COMPANY B. The Petitioner is thus not liable for a personal penalty to the state under Utah Code Ann. §59-1-302.

DECISION AND ORDER

Based upon the foregoing, the Tax Commission reverses the personal penalty assessment in the amount of \$\$\$\$\$. It is so ordered.

DATED this ____ day of _____, 2007.

Clinton Jensen
Administrative Law Judge

BY ORDER OF THE UTAH STATE TAX COMMISSION:

The Commission has reviewed this case and the undersigned concur in this decision.

DATED this ____ day of _____, 2007,

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

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Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

Notice of Appeal Rights: You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code Ann. §63-46b-13. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Ann. §§59-1-601 and 63-46b-13 et. seq.

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